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No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1941

UNITED STATES OF AMERICA, AS GUARDIAN OF THE INDIANS OF THE TRIBE OF HUALPAI IN THE STATE OF ARIZONA, PETITIONER

v.

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE GOVERNMENT OF THE UNITED STATES

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In the lower courts the United States has urged on behalf of the Walapai that, whether or not the tribe had a compensable right of occupancy or possession against the United States, the railroad, as a grantee without sovereign rights or political powers, took subject to the Walapai's right of occupancy. *Beecher* v. *Wetherby*, 95 U. S. 517, 525–526; *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55. The position of the United States as guardian of the Walapai and as a defendant in other cases

against Indian claims was, therefore, wholly consistent. The Solicitor General was of the view that this position was entirely sound, but yet felt that the Walapai should be free, if their counsel so chose, to make the broader argument that their rights of occupancy ran against the United States. Accordingly, he authorized the Solicitor of the Department of the Interior to present the case to this Court.[1]

The brief filed on behalf of the petitioner (pp. 15–17, 36, 40, 41) expressly disavows any challenge to the conclusion, several times sustained by the Court of Claims, that in the absence of treaty recognition or confirmation mere aboriginal possession will not ground a right of occupancy or claim for compensation against the United States. *Duwamish, et al. Indians* v. *United States*, 79 C. Cls. 530, 597–603, certiorari denied, 295 U. S. 755; *Coos Bay Indian Tribe, et al.* v. *United States*, 87 C. Cls. 143, 152–153, certiorari denied, 306 U. S. 653; *The Wichita Indians, et al.* v. *United States*,

[1] Respondent seems to read this authorization as evidence of a difference between the Departments of Justice and Interior, or between the United States and the Walapai (Br. 8–9; see also brief of *amici curiae*, p. 2). This emphatically is not the case. Since the broader argument, as to rights of occupancy against the United States is not advanced by petitioner, there is no basis whatever for suggesting that petitioner's argument is on behalf of the Walapai in contrast to the United States, or that the Solicitor of the Department of the Interior is acting "as advocate for the Indians" rather than "as counsel for the Government."

89 C. Cls. 378, 416. There is, therefore, no occasion for the United States to file a brief to protect its interest in avoiding the liability, which is large under existing jurisdictional acts and might be staggering under possible future acts, which would result from a reversal of the rule established in the Court of Claims.

In cases pending in the Court of Claims (*Northwestern Bands of Shoshone Indians* v. *United States* and *The Indians of California* v. *United States*, Nos. M–107 and K–344, respectively), the Government has also contended that the Spanish and Mexican law accorded no rights to the "wild" tribes inhabiting the lands of the Mexican cession against the sovereign, although there may have been an occasional recognition of their rights as a matter of political exigency. In the present case petitioner's brief, while contending that the Walapai were not a "wild" tribe, also contends that the "wild" tribes enjoyed certain rights of occupancy under Spanish and Mexican law against others than the sovereign. Since this point is fully treated in the briefs both of petitioner (pp. 61–79) and of respondent (Part 1, pp. 72–75, Part 2, pp. 1–13), additional discussion is not required.

Respectfully,

CHARLES FAHY,
Acting Solicitor General.

OCTOBER 1941.

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